IN THE

Supreme Court of the United States

October Term 1940.

No. 987

SABINE TOWING COMPANY, INCORPORATED,

Petitioner,

versus

CONTINENTAL INSURANCE COMPANY, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Sabine Towing Company, Inc., petitioner (plaintiff and appellee below), respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Fifth Circuit to review the decree of that

Court entered February 7, 1941 (R. 615) Reported in 117 F. 2d 694, reversing the decree of the District Court of the United States for the Eastern District of Texas entered on April 2, 1940, and wherein the District Court, sitting without a jury, in a case at law, awarded judgment in favor of petitioner against respondent on two certain Protection and Indemnity policies of insurance.

STATEMENT OF THE CASE.

This litigation was commenced by petitioner herein instituting an action at law in the United States District Court for the Eastern District of Texas against respondent to recover the amount paid by petitioner on judgments recovered against petitioner in litigation growing out of the sinking of petitioner's tug "Edgar F. Coney" in the Gulf of Mexico as a result of which the entire crew of this tug was lost. In addition to judgments and costs, petitioner also claimed the cost incurred in the defense of the claims resulting in judgments against petitioner herein. The amount claimed by petitioner herein against respondent was in the total sum of Seventy Thousand One Hundred Two and 41/100 ($70,102.41) Dollars, this amount being claimed under two certain policies of Protection and Indemnity insurance issued by respondent to petitioner, and which policies, according to their terms, insured petitioner as owner of the tug "Edgar F. Coney" "* * * against their losses resulting from liability as shipowners". It was further provided in said policies as follows:

> "This company hereby undertakes to make good to the assured * * * all such losses and/or damages

and/or expense as the assured shall, without fault or privity on the part of the assured, become liable to pay and shall pay, not exceeding the amount of this policy on account of liabilities, risks, events, happenings and/or occurrences herein set forth.

"Protection and Indemnity Risks.

"Protection.

"(a) For * * * loss of life or personal injury caused to any person being carried in * * * the vessel named herein."

The law costs were claimed under a separate provision of the policies which provided for the reimbursement thereof to the assured where the claims were defended with the written consent of the respondent.

Petitioner's tug, "Edgar F. Coney", so covered by insurance, sank in the Gulf of Mexico, resulting in the loss of the lives of her crew, and at a time when the policies were in full force and effect. That subsequent thereto, personal representatives of the deceased members of the crew filed suits against petitioner in the State Court claiming damages in the total sum of Two Hundred Fifty Thousand ($250,000.00) Dollars. That with written consent of respondent herein these claims were defended by petitioner. That in the defense of these claims the petitioner herein, and as permitted under Revised Statutes 4282-4283, 46 USCA 183-185, filed in the United States District Court for the Eastern District of Texas, (the same court in which the instant action at law was filed), its petition for exoneration from or limitation of liability. That various death claimants appeared and filed claims

and answers in said proceedings, and wherein the question of petitioner's liability for such loss of life claims was adjudicated. The District Court, in that proceeding, decreed that petitioner was not entitled to exoneration from or limitation of liability for said loss of life claims. That on appeal by petitioner to the United States Circuit Court of Appeals the decision of the lower Court, denying petitioner's prayer, was affirmed, Circuit Judge Foster dissenting on the ground that in his opinion the case was one for limitation of liability.

That subsequent to the affirmance of the judgment of the lower Court, final judgments were entered fixing claimants' recovery herein in the sum of approximately Sixty-one Thousand ($61,000.00) Dollars.

Petitioner herein claimed from respondent reimbursement up to Forty Thousand ($40,000.00) Dollars, the total amount of the liability provisions of the policies plus costs of defense covered by a separate provision of the policy making up its claim against petitioner in the aforesaid sum of Seventy Thousand One Hundred Two and 41/100 ($70,102.41) Dollars.

The defense urged by respondent to the payment of this claim was as follows:

(1) That as the Court, in the limitation of liability proceeding, had denied to petitioner its prayer for exoneration from or limitation of liability and that under the clause of the policy hereinabove quoted under which respondent agreed to make good to the assured all losses, damage, and expense that the assured "shall, without fault

or privity on the part of the assured, become liable to pay, etc.," respondent urged that it bound itself only to such risks as occurred "without the privity or knowledge of the assured". Respondent contended that by reason of the judgments in said cause (referring to the said limitation of liability proceeding) the question of privity and knowledge of the plaintiff to the unseaworthiness of the tug "Edgar F. Coney" having been adjudicated against the plaintiff and pleaded the same as *res adjudicata* that the loss occurred not with the "privity or knowledge" of petitioner, but with the "fault or privity" of petitioner as excepted under the policies.

This defense, in other words, is that a mere denial of a shipowner's statutory right to limit his liability, based on a finding that the loss occurred with the shipowner's "privity or knowledge", as said term is used in said proceeding under the statute (46 USCA 183), was a finding of "fault or privity on the part of the assured" within the meaning of those words as used in a Protection and Indemnity insurance policy secured by the assured and for which it paid a premium.

As an alternative defense it alleged that if liable herein, its liability for death claims and law costs combined should not exceed Forty Thousand ($40,000.00) Dollars. It is not denied herein that if the District Court was correct in allowing law costs in addition to $40,000.00 the total amount awarded is correct.

The District Judge found against respondent on both of its contentions and entered a judgment against respondent for the full amount claimed herein.

The trial in the District Court was had as an action at law before the Judge without a jury.

On the trial of this case plaintiff offered in its behalf the testimony of six of the most outstanding American Insurance men. Five of these witnesses testified by deposition some sixty days before the day of the trial. The sixth witness, an outstanding insurance man, and the president of plaintiff company also testified in open court.

The American witnesses produced on behalf of plaintiff and testifying with respect to an American insurance policy testified that the words "fault or privity" as used in the insurance trade have a general, accepted, peculiar, or characteristic meaning and unlike the words privity or knowledge as used in the statute were confined to a deliberate, intentional or wrongful act, or negligence so gross as to amount to such. These witnesses so testifying consisted of the following: LaBoyteaux, in the insurance business since 1899 and, at the time of testifying, president of Johnson-Higgins Insurance Brokers in New York (R. 480, 484); Knowles, with 31 years' experience in the insurance business and, at the time of testifying, vice-president and head of the Insurance Department of C. D. Mallory & Co., Inc., (R. 506, 508); Sullivan, who had handled P. & I. policies since 1920 and, at the time of testifying, was with Frank B. Hall & Co. (R. 519, 537); Stillman, with 40 years' experience in the insurance business during all of which time he was with Mathers, Ltd., Insurance Broker (R. 532); Neville, with 30 years' experience with P. & I. policies and, at the time of testifying, manager of the Adjusting Department of Marsh-

McLennen Insurance Brokers and Average Adjusters (R. 543, 545); Gore, 20 years' experience with P. & I. policies and who, at the time of testifying, was a Director of Francis C. Carr & Co. (R. 215, 303); Ball, president of petitioner company and who, in his position with that company, handled P. & I. policies in large amounts since 1905 (R. 36, 46).

Ball also testified (R. 46):

> "Q. And from your experience and investigation with respect to placing this large amount of insurance that you have placed, have you discussed with brokers and insurance men the application applied to the words fault or privity in the insurance business?
>
> "A. I did.
>
> "Q. And what did you find to be that application?
>
> "A. That I would be afforded that protection except for losses resulting from wrongful acts, intentional acts or intent.
>
> "By the Court:
>
> "What was meant by wrongful acts?
>
> "By the Witness:
>
> "An act in which I had knowledge of its unseaworthiness prior to the accident and permitted it to continue."

This testimony given by the president of petitioner as to the extent of the coverage stands without contradiction.

To the testimony as to the meaning of the words "fault or privity" as used in the insurance business defendant entered a general objection. The substance of this objec-

tion was that the words "fault or privity" had an established legal meaning and that parol evidence that these words as used in the policies had a characteristic meaning in the insurance trade was inadmissible; that there was no ambiguity; and that the said words must be taken and understood in their plain, ordinary meaning. The objections appear at R. pp. 363, 365, and were overruled R. 366.

Notwithstanding that these objections had been overruled and although, for some two months before the trial, defendant had in its possession the testimony of five of plaintiff's witnesses, defendant in its behalf and on the day of trial produced only two witnesses, both insurance men, but neither of whom made any attempt to contradict the testimony offered on behalf of plaintiff, but rested its case on the testimony of the aforesaid two witnesses produced in its behalf. That several weeks after the submission of the case, and with same under consideration by the District Judge, respondent applied for and secured an order reopening the case to permit it to take further testimony, not of American Insurance witnesses with respect to the meaning of certain words as used in an American insurance policy as involved, but of English insurance men residing in London, England. In this motion to reopen the case, and which appears at R. 554, it is in part stated:

> "The defendant further shows that the aforesaid witnesses are General Managers of three of the largest Protection and Indemnity Associations existing, and are fully prepared to testify, if it is admissible, as to the construction given, in the Insurance world to the words 'Fault or Privity' of the owner. The defendant is informed and believes that said wit-

nesses will testify that no such construction as that contended for by the plaintiff has ever been given the words 'Fault or Privity', but that the same are used and construed in their usual and ordinary sense and are given the same construction as the similar words used in the limitation of liability statutes of England and America, and that all of said witnesses will testify that they have been connected with and have been Managers of Protection and Indemnity Societies for many years, and have never known of, or been informed of the construction of said words contended for by plaintiff."

In due course this testimony was taken in London, and five witnesses were examined on behalf of defendant. We pause here to point out that one of said witnesses, so testifying for defendant, and who had fifty years experience with Protection and Indemnity policies, at page 592, on direct examination, testified as follows:

"Q. It has been testified in this case that the words 'fault or privity' are confined to intentional, deliberate or wilful acts of the shipowners; have you heard of any such meaning?

"A. Yes, I think that is the general meaning of them."

The testimony of the five English witnesses was offered in evidence on behalf of defendant.

With the testimony of the American witnesses, who testified on this question for plaintiff, and that of the English witnesses, who testified on behalf of the defendant, the Court, sitting without a jury, and considering an American insurance policy, rendered a memoranda opin-

ion, and which was subsequently embodied in formal findings of fact and conclusions of law. The court found for petitioner for the full amount claimed.

OPINIONS BELOW.

The memoranda opinion of the District Judge appears at R. 619. His findings of fact and conclusions of law at R. pp. 598, 606. The majority opinion of the United States Circuit Court of Appeals appears in the R. p. 634. The dissenting opinion of Circuit Judge McCord appears at R. p. 646.

In the memoranda opinion of the District Judge, he, in part, states:

> "After much consideration of the above entitled matter, I am of the opinion that plaintiff is entitled to recover the full amount claimed under the policies in question as the negligence of the owners of the vessel was not so gross as to amount to a wilful, deliberate, and intentional wrong, which is the only kind of negligence that would, in my opinion, avoid liability under the policies in question * * *."

The Court further found that the prior litigation in the limitation of liability proceeding was conducted with the written consent of defendant and that plaintiff was, under the said policies, entitled to costs and expenses incurred in defending the claims.

In his findings of fact (R. 604) the District Judge, in referring to his findings in the limitation of liability proceeding, further found herein:

"IV.

> "I find that the negligence of plaintiff herein, as found in said limitation of liability proceedings, and upon which plaintiff herein, petitioner therein, was found liable and denied the right of limitation of liability under R. S. 4283-4285, was not deliberate, or intended, or gross in character, and that plaintiff herein, became liable to pay, and did, pay for the said loss of life, without fault or privity on the part of plaintiff herein within the meaning of the two said policies of protection and indemnity insurance hereinabove referred to."

The District Court's finding herein as above quoted is based on facts in the limitation of liability proceeding which established without contradiction, that some ninety days before the loss of the tug, she was purchased by petitioner for Thirty Thousand ($30,000.00) Dollars, and at the time of her purchase and for some ten years prior thereto, she had safely and successfully operated in the Gulf of Mexico and Atlantic Ocean. That after the purchase of said tug, petitioner, in the repair and alteration thereof under the supervision of the United States Local Inspectors and in doing everything they and the said inspectors deemed necessary to make her a good, staunch and seaworthy tug, spent in said repair the sum of Twenty Thousand ($20,000.00) Dollars. After the repairs the United States Local Inspectors issued to said tug a Certificate of Inspection as to seaworthiness, and for about

thirty days before her loss she had been successfully and safely operated in the service of petitioner. Notwithstanding this fact, the lower Court and the majority opinion of the United States Circuit Court of Appeals in the limitation of liability proceedings found the vessel unseaworthy, and that this unseaworthiness caused the loss. Neither Court found that petitioner, prior to the loss, knew that the vessel was unseaworthy. On the contrary they found that the petitioner had no knowledge of what the Court found to be unseaworthiness. The findings of liability was based on a holding that there was a non-delegable duty on the part of petitioner to the crew to furnish a seaworthy tug and, having breached this duty, petitioner was liable irrespective of negligence. The Court imputed to petitioner knowledge of this unseaworthiness and therefore held that the petitioner had not shown that the loss had not occurred without their privity or knowledge, and on said finding, denied to petitioner the Statutory right to exoneration from or limitation of liability. The opinion of the District Court and the United States Circuit Court of Appeals in the limitation of liability proceeding was offered in evidence by respondent herein and appears at (R. 619) and (R. 440).

In the dissenting opinion of Circuit Judge McCord herein and referring to the record in the limitation of liability proceeding, in part says:

> "No contention is made in this case that appellee was guilty of wanton or wilful misconduct. So far as the record discloses the insured was honest and forthright in and about its business. At most it was guilty of simple negligence and bad judgment. For

> this dereliction this court has heretofore decreed that it must pay out large sums for the loss of seamen who were on the tug. Now it is told by the majority opinion that since it was guilty of simple negligence and bad judgment it may not recover the amount of insurance it carried on the vessel."

In the majority opinion herein of the United States Circuit Court of Appeals in the instant case, the Court in referring to the oral testimony offered on behalf of plaintiff, and which was offered to show that in the insurance world the words "fault or privity" as used in the policies had a well-understood meaning different from the dictionary or popular meaning, in part says:

> "Its reliance on oral testimony will not do, for in the case of the use in insurance policies or other contracts of words like these, having a plain and settled meaning in both popular and legal usage, oral testimony is inadmissible to contradict or vary that meaning."

Circuit Judge McCord in his dissenting opinion herein (R. 646) in part says:

> "I do not agree that the words 'fault or privity' have a 'plain and settled meaning in both popular and legal usage'. There seem to be no decisions construing the same or similar language in policies of marine insurance and I think the oral testimony of qualified witnesses, such as was offered in this case, was admissible to show that the words 'fault or privity' have a recognized and well-understood meaning among underwriters and their customers, and that this characteristic meaning is different from the ordinary dictionary definition. Policies of insurance, like

other contracts, are to be construed to give effect to the intention of the parties and 'In examining, for the first time, any question under a policy of insurance, it is necessary to ascertain whether the contract has received a practical construction, by merchants and underwriters.' General Mutuai Ins. Co. v. Sherwood, 14 How. 351, 352, 362; Western Petroleum Co. v. Tidal Gasoline Co., 7 Cir., 284 F. 82; Daniel v. Pappas, 8 Cir., 16 F. 2d 880; The Svartfore, D. C., 38 F. 2d 874; New Roads Oilmill & Mfg. Co. v. Kline, 5 Cir., 154 F. 296; Duer on Marine Insurance, Vol. 1, p. 187."

Judge McCord, in referring to the testimony of witnesses who testified on behalf of plaintiff, in part, further states (R. p. 647):

"W. Harvel LaBoyteaux, President of Johnson & Higgins, insurance brokers of New York, with a background of over fifty years in the insurance business, testified that he was familiar with 'fault or privity' clauses in 'P. & I. policies, and that P. & I. insurers have generally interpreted the clause in the policy or club rules as applying only if the owner has knowingly and wilfully tolerated or permitted conditions so dangerous as to practically amount to moral turpitude.'

"Ellis Knowles, Vice-President and head of the Insurance Department of C. D. Mallory & Co., Inc., and who had been in the insurance business for thirty-one years, testified that the words 'without fault or privity' have a generally accepted meaning in the insurance business and that, 'If an owner is deliberately crooked * * *—guilty of moral turpitude—then a P. and I. underwriter should not reimburse the owner, but if an owner is innocent of any intent or wrongdoing,

the P. and I. underwriter should not hide behind any technicality in either the law or the policy.'

"Arthur J. Sullivan, who had been an Average Adjuster since 1917, testified that he was familiar with P. & I. policies containing 'fault or privity' clauses; that the words 'without fault or privity' have a generally accepted, 'peculiar or characteristic meaning' in the insurance business; and that, 'The meaning is that when a loss has been sustained through the deliberate and wilful act of the assured, the underwriters shall be relieved of liability. * * * I think the words must be given a particular meaning, because if they are taken in their ordinary dictionary sense that will entirely destroy the effect of the policy, because the functions of a P. and I. policy is to protect the owner from losses that may arise through somebody's negligence in connection with the operation of steamships. That is the essential purpose of the policy. There is also a fault in the P and I. claim, and if we exclude every claim in which there may be a fault we, in effect, completely destroy the purpose of the policy, and some sense must be given to these words of the policy, and they cannot be construed in a way that will entirely destroy the policy. Q. And the construction you have given us is what you consider their meaning, generally, in the insurance business to be? A. Yes.'

"Testimony of other witnesses for the appellee is to the same effect. This evidence shows that in the insurance business it is generally understood that for the underwriter to escape liability because of the 'fault or privity' provision the negligence of the owner must measure to wilful, deliberate, or intentional wrong."

There is therefore involved herein a distinct and contrary ruling of law as to the interpretation of contracts, especially insurance contracts, and a distinct and contrary holding as to the meaning of the controlling words in the policy, "fault or privity", wherein two Circuit Judges differ from another Circuit Judge of their Court, and from the District Judge who tried and decided the case in the District Court in an action at law sitting without a jury.

QUESTIONS PRESENTED.

1. Are the words "fault or privity" as used in a contract of Protection and Indemnity policy of insurance, a contract by a paid insurer to relieve its promisee of loss, to be given the same meaning as that given by the Courts in interpreting the words "privity or knowledge" as used in the Shipowners Limitation of Liability Statute (R. S. 4283-4285) (46 USCA 183-185), so that when a shipowner in such a limitation of liability proceeding is denied the statutory right to limit his liability, is he to be denied the right to recover under said insurance policy of Protection and Indemnity?

2. Can the words "fault or privity" as used in Protection and Indemnity policies of insurance be held to have a plain and settled meaning in both popular and legal sense and a meaning contrary to what witnesses, long experienced with such policies including such words, testify that they have in the insurance trade to which the contract applies?

3. Is not parole testimony admissible to establish the settled construction given by the insurance trade to the words "fault or privity" in insurance policies, as differing from the natural import of the words, and should not such meaning be sanctioned by the Court?

THE REASONS RELIED UPON FOR GRANTING THE WRIT.

The reasons for which this petitioner asks that a writ of certiorari be issued are as follows:

1. The question presented is the interpretation of a Protection and Indemnity policy, the object of which is to afford protection to shipowners, in addition to that afforded by the ordinary marine policy. The question was submitted for judicial determination for the first time, wherein the Circuit Court of Appeals for the Fifth Circuit, with one Judge dissenting, reversed the Judge of the District Court with the result that the case was decided by an equal division of Judges within the Circuit pertaining to the construction of an important commercial contract, and that construction adopted by the majority opinion, in holding that the interpretation as placed thereon by the business world is inadmissible, is contrary to what this Court has said with respect to such contracts. In *Peters v. Warren Insurance Co.*, 14 Peters 99, this Court said:

> "If there be any commercial contract which more than any other requires the application of sound common sense and practical reasoning in the exposi-

> tion of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance, for it deals with the business of common men who are unused to deal with abstracts of refined distinctions."

And the Fifth Circuit Court of Appeals is also in conflict herein with the Eighth Circuit Court of Appeals, which court, in *E. I. DuPont de Nemours & Co. v. Claiborne-Reno Co.*, 64 F. (2d) 224, said:

> "Contracts are ordinarily to be performed by business men and should be given the interpretation to be placed upon them by the business world."

2. The Circuit Court for the Fifth Circuit in holding that parole testimony was inadmissible to show the meaning of the term used in the policy, as acquired by custom and usage of the insurance trade, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit, in *Daniel v. Pappas*, 16 F. (2d) 880, wherein that court said:

> "In the construction of mercantile contracts, parol evidence is admissible to show that the terms used therein have acquired, by the custom of the locality or the usage of the trade, a peculiar significance; and this is true, although the terms used may not in themselves appear to be ambiguous. Such evidence does not contradict the contract, but simply applies them to the subject matter."

3. The Circuit Court of Appeals for the Fifth Circuit also rendered its decision in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit in the

case of *Western Petroleum Company v. Tidal Gasoline Company*, 284 Fed. 82, wherein that court said:

> "It is an elementary principle of judicial interpretation that the test to be applied is what the ordinary user of the language would understand the words under the circumstances to mean, Holmes, 'The Theory of Legal Interpretation,' 12 H. L. R. 417. Another familiar principle of construction provides that, while the standard of ordinary usage is prima facie the one to be applied, it is nevertheless competent to show that in point of fact in the particular trade to which the contract has reference the words to be construed have a peculiar and special trade meaning, and the parties, being members of that trade, must have understood the words in that special sense. Wigmore on Evidence, §§2463, 2464; Willingston on Contracts, §850."

4. Because of the importance of the question involved herein, a question of law, and in view of the fact that the question herein presented is for the first time squarely put before the courts, the majority opinion stated "* * * we have been referred to no cases construing these words when used in a policy * * *"; and as stated in the dissenting opinion "there seem to be no decisions construing the same or similar language in policies of marine insurance".

And as stated in *The Morro Castle*, 117 F. (2d) 404 (decided by the Circuit Court of Appeals for the Second Circuit on January 27, 1941, a suit on a protection and indemnity policy and in which we are informed an application for writ of certiorari is being made to this Honorable Court) "There seem to be no explicit decisions to guide us

as to the meaning of the crucial words in the policy"; and with respect to which words as used in the statute, the Circuit Court of Appeals in the instant case in its majority opinion, said:

> "We think it plain that they have the same meaning and effect when used in the policies in suit."

In the dissenting opinion herein Judge McCord took a contrary view, saying:

> "The words 'fault or privity' as used in the policy of insurance should not be limited to the interpretation placed upon similar language used in the American and English limitation of liability statutes."

And as stated in *The Morro Castle* case:

> "* * * the analogy between the statutory provision for limited liability and a contract by a paid insurer to relieve the promisee of loss should not be pressed too far."

That therefore this Honorable Court should, in the public interest, grant the writ herein to the end that it may decide this question; one of widespread public importance, and on which there is a diversity of opinion.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and to send to this Court, for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in